



Signed and Filed: April 26, 2006

*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
THEODORE A. KOLB,  
Debtor.  
  
ROBERT M. CASSEL, on behalf of  
this Chapter 11 Estate,  
Plaintiff,  
v.  
HILDE KOLB, Trustee, JONATHAN  
KOLB, RICHARD KOLB and DOUGLAS  
KOLB,  
Defendants.

Case No. 97-32321  
Chapter 11

Adv. No. 99-3144

Status Conference  
235 Pine St., 22d Flr.  
May 11, 2006  
1:30 p.m.

**MEMORANDUM DECISION REGARDING JUDICIAL ESTOPPEL<sup>1</sup>**

Judicial estoppel arises in several forms. It may be invoked to prevent a party from gaining an advantage by taking inconsistent positions, or to "protect against a litigant playing fast and loose with the courts," or because of "general

<sup>1</sup> The following discussion constitutes the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052 (incorporating by reference Fed. R. Civ. P. 52(a)).

1 consideration[s] of the orderly administration of justice and  
2 regard for the dignity of judicial proceedings." Russell v.  
3 Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (citations and internal  
4 quotation marks omitted), cert. denied, 501 U.S. 1260 (1991).  
5 Judicial estoppel may be invoked sua sponte. Id. ("Because it is  
6 intended to protect the integrity of the judicial process,  
7 [judicial estoppel] is an equitable doctrine invoked by a court at  
8 its discretion."). For the reasons set forth below, the court  
9 invokes judicial estoppel in this adversary proceeding.

10 I. Facts

11 A few days before filing his voluntary chapter 11 petition  
12 debtor Theodore A. Kolb ("Ted") disclaimed his contingent  
13 remainder interest in the estate of his father Dr. Leon Kolb  
14 ("Leon"). This court entered a judgment that Ted's disclaimer was  
15 effective and his contingent interest rightfully belonged to his  
16 children not his creditors. The district court affirmed that  
17 judgment, but the Court of Appeals for the Ninth Circuit later  
18 reversed, holding that Ted's disclaimer was ineffective and his  
19 "contingent interest is an asset of the bankruptcy estate." In re  
20 Kolb, 326 F.3d 1030, 1041 (9th Cir. 2003).

21 Meanwhile Ted and his siblings had already liquidated Leon's  
22 assets and distributed the proceeds to Ted's children, three adult  
23 sons. In state court<sup>2</sup> they filed two reports resulting in orders  
24 that allegedly protect them and Ted's children from liability.

25 The first report, filed on April 25, 2001 (the "First  
26 Report"), petitioned the state court to appoint Ted and his

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27 <sup>2</sup> In the Matter of the Estate of Dr. Leon Kolb, Deceased  
28 (San Francisco Superior Ct. No. 217919).

1 siblings as Successor Trustees to Hilde Kolb ("Hilde"), Leon's  
2 widow, who had been Trustee of Leon's trust until she died on  
3 September 18, 2000.<sup>3</sup> The First Report claims that "[a]ll of the  
4 beneficiaries" of Leon's trust had waived the requirement of  
5 filing of an account on behalf of Hilde and that pursuant to Ted's  
6 disclaimer "the one-third share of [Ted in Leon's estate] evolved  
7 [sic] upon his three children . . . in equal shares." In a later  
8 report entitled "Final Report on Waiver of Account and Petition  
9 for Discharge by Successor Trustees" (the "Second Report") the  
10 Successor Trustees told the state court that "the beneficiaries"  
11 had requested the distributions they had made and that "all of the  
12 beneficiaries" had consented to the Successor Trustees' discharge.

13 This was false and misleading. Ted's creditors, represented  
14 by Robert M. Cassel ("Cassel"),<sup>4</sup> asserted and later established  
15 that they and not Ted's children were the true beneficiaries of  
16 Ted's share, and they certainly did not waive any accounting or  
17 consent to the Successor Trustees' distributions and discharge.

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19  
20 <sup>3</sup> The First Report was the first one filed by the  
21 Successor Trustees in Leon's estate but was filed on behalf of  
22 Hilde as her second and final report. It is entitled "Second and  
Final Report on Waiver of Account on Behalf of Hilde Kolb as  
Trustee of the Trust Created Pursuant to Paragraph Fifth of the  
Will of the Above-Named Deceased."

23 <sup>4</sup> This court has granted Cassel authority to bring this  
24 adversary proceeding on behalf of Ted's bankruptcy estate on a  
25 contingency fee basis. Pursuant to Ted's confirmed liquidating  
26 plan the claims in this adversary proceeding and all other non-  
27 exempt assets were transferred to a Liquidating Trust. Cassel has  
28 continued to prosecute this action and on June 11, 2003, he filed  
a motion that among other things sought to join the liquidating  
trustee, Uecker & Associates, Inc. (the "Liquidating Trustee"), as  
an additional plaintiff pursuant to Fed. R. Civ. P. 19(a)(2)(i),  
21 and 25(c) (incorporated by Fed. R. Bankr. P. 7019, 7021 and  
7025) (the "Post-Remand Motion").

1       The Successor Trustees do not deny that when they filed the  
2 First and Second Reports they had notice of Cassel's claims. On  
3 September 22, 2000, Cassel had filed a Notice of Pendency of  
4 Action Challenging Validity of Disclaimer (the "Cassel Notice")  
5 which noted that this adversary proceeding had been commenced to  
6 set aside Ted's disclaimer, disclosed that a judgment adverse to  
7 Cassel had been entered, and stated that "[t]he matter has been  
8 appealed . . . ." In addition, the same lawyers who represented  
9 the Successor Trustees and Ted's children in state court had been  
10 arguing for years in federal court over whether Ted's disclaimer  
11 was effective, and that issue had not yet been resolved by the  
12 Ninth Circuit.<sup>5</sup>

13       The Successor Trustees nevertheless executed verifications of  
14 the First and Second Reports and Ted's children each executed a  
15 Waiver of Filing of An Account in which each claimed to have  
16 received assets to which he "is entitled." In reliance on the  
17 First Report the state court issued an order on June 13, 2001,  
18 repeating word for word the statements that "all beneficiaries"  
19 had waived an accounting and that Ted's interest had "evolved"  
20 upon his children pursuant to his disclaimer (the "State  
21 Disclaimer Order").<sup>6</sup> In reliance on the Second Report the state  
22 court issued an Order Terminating Trust and Discharge of Successor  
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24       <sup>5</sup>       The conduct and statements of attorneys can be imputed  
25 to parties for purposes of judicial estoppel. See Hall v. GE  
26 Plastic Pacific PTE, Ltd., 327 F.3d 391, 396 (5th Cir. 2003)  
(citing cases).

27       <sup>6</sup>       The State Disclaimer Order is entitled "Order Settling  
28 Second and Final Report of Trustee on Waiver of Account on Behalf  
of Hilde Kolb as Trustee."

1 Trustees, on June 27, 2002, stating that "all beneficiaries" had  
2 once again waived an accounting, that Leon's trust "is  
3 terminated," and that the Successor Trustees "be discharged" (the  
4 "State Discharge Order").

5 The Successor Trustees and Ted's children did not notify the  
6 Ninth Circuit or Cassel of these developments. They did not argue  
7 to the Ninth Circuit that the issue before it -- the validity of  
8 Ted's disclaimer -- had been mooted by the State Disclaimer Order,  
9 the State Discharge Order, or both. Had they done so they would  
10 have had to serve Cassel with whatever notice they gave to the  
11 Ninth Circuit, which would have alerted Cassel to the proceedings  
12 in state court.

13 Instead Ted's children waited until June 23, 2003, after the  
14 Ninth Circuit ruled against them and had remanded to this court,  
15 to assert in a motion for summary judgment ("Ted's Children's  
16 MSJ") that this court is powerless to enter any judgment against  
17 them because of the state court orders, notwithstanding the Ninth  
18 Circuit's determination that Ted's disclaimer was invalid. They  
19 also argue, as part of their opposition to Cassel's Post-Remand  
20 Motion, that this court is powerless to enter any judgment against  
21 the Successor Trustees because they were "validly discharged" by  
22 the state court.

## 23 II. Procedural history

24 The Ninth Circuit "den[ied] without prejudice to renewal  
25 after remand to the Bankruptcy Court [Cassel's] motion for  
26 substitution contained in the suggestion of [Hilde's] death filed  
27 under Federal Rule of Appellate Procedure 43(a)." Kolb, 326 F.3d  
28 at 1041 n. 12. Cassel's Post-Remand Motion renews this request to

1 substitute the Successor Trustees as defendants in place of Hilde  
2 and also (a) seeks to join the Liquidating Trustee as an  
3 additional plaintiff and (b) requests entry of judgments against  
4 Ted's children and the Successor Trustees "decreeing that the  
5 property sought to be disclaimed by [Ted] was property of this  
6 bankruptcy estate, as mandated by the Ninth Circuit Court of  
7 Appeal, and directing each of the defendants to turn over and  
8 deliver said property or the value thereof." The Post-Remand  
9 Motion and Ted's Children's MSJ (collectively, the "2003 Motions")  
10 came on for hearing on July 25, 2003. The court ruled in favor of  
11 Cassel but no written orders were issued because the parties  
12 disputed the form of such orders and then engaged in protracted  
13 attempts to settle their disputes. No settlement was reached.

14 On November 15, 2005, the Successor Trustees filed a motion  
15 to set aside the court's oral ruling permitting Cassel to  
16 substitute them as defendants and a motion in support of Ted's  
17 Children's MSJ. Ted's children also filed a motion on December  
18 19, 2005, for reconsideration of the court's oral denial of their  
19 MSJ.<sup>7</sup> Meanwhile, on December 2, 2005, Cassel filed a counter-

20  
21 <sup>7</sup> Like several of the documents filed in this adversary  
22 proceeding the actual title of this motion filed by Ted's children  
23 is confusing: "Motion in Support of Kolb Beneficiaries' Motion  
24 [meaning the Successor Trustees' Motion?] for Reconsideration of  
25 Denial of Motion for Summary Judgment." Although "[t]he rules do  
26 not recognize a motion for reconsideration" as such (In re Captain  
27 Blythers, Inc., 311 B.R. 530, 539 (9th Cir. BAP 2004)) the court  
28 has the inherent discretion to reconsider its orders prior to  
final judgment, as Ted's children and the Successor Trustees point  
out. Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S.  
1, 12 (1983); City of Los Angeles, Harbor Div. v. Santa Monica  
Baykeeper, 254 F.3d 882, 886 (9th Cir. 2001). In addition, the  
court would reach the same result set forth in this memorandum  
decision under Fed. R. Civ. P. 52(b), 59(a), or 60(b) (made  
applicable in bankruptcy by Fed. R. Bankr. P. 7052, 9014(c), 9023,

1 motion for summary judgment (the "Cassel MSJ"). These various  
2 motions (collectively, the "2005 Motions") came on for hearing on  
3 February 6, 2006, and at the end of the hearing the court directed  
4 the parties to file briefs on the issue of judicial estoppel and  
5 took the motions under advisement. On February 17, 2006, Cassel  
6 and the defendants filed briefs regarding judicial estoppel and  
7 the 2005 Motions were submitted.

8 III. Discussion

9 The Successor Trustees and Ted's children argue that Cassel's  
10 exclusive remedy is in state court, but that is not the law.  
11 First, the doctrine of judicial estoppel is not limited to  
12 proceedings before the same court. It is regularly applied to  
13 incompatible statements and positions before different courts and  
14 in different cases. Rissetto v. Plumbers & Steamfitters Local  
15 343, 94 F.3d 597, 605 (9th Cir. 1996). Indeed, judicial estoppel  
16 may be even more appropriate in such situations because  
17 "[i]nconsistent positions in different suits are much harder to  
18 justify" than inconsistent pleading within one suit. Astor  
19 Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540,  
20 1548 (7th Cir. 1990) (cited with approval by Rissetto, 94 F.3d at  
21 605).

22 Second, California might "have a more limited or different  
23 view of judicial estoppel" but whether or not that is so it "does  
24 not preclude [a federal court] from determining what rule is  
25 appropriate for [federal] purposes." Russell, 893 F.2d at 1038.  
26 This court assumes without deciding that the defendants would  
27 \_\_\_\_\_  
28 and 9024).

1 prevail in state court on the various arguments that they raise  
2 here -- that Cassel was not entitled to notice of the First and  
3 Second Reports because he did not properly request such notice,  
4 that the state court orders have become final and can no longer be  
5 challenged, and so on. Whatever the outcome would be in state  
6 court, this court has an independent obligation to protect the  
7 integrity of proceedings before it. Russell, 893 F.2d at 1038  
8 ("Each court, state and federal, is entitled to have whatever  
9 rules of judicial estoppel it considers necessary to protect its  
10 dignity and it[s] system of justice.").

11 The circumstances under which judicial estoppel may  
12 appropriately be invoked "are probably not reducible to any  
13 general formulation of principle" but the decision to apply  
14 judicial estoppel, or at least the preclusion of advantage from  
15 inconsistent positions, is typically informed by three factors:  
16 (a) whether there was a "clearly inconsistent" position,  
17 (b) whether the first position was accepted by a court so that  
18 acceptance of a second position would create the perception that  
19 one of the courts was misled, and (c) whether an unfair advantage  
20 or unfair detriment would result without an estoppel. New  
21 Hampshire v. Maine, 532 U.S. 742, 750-51, reh. den., 533 U.S. 968  
22 (2001) (citations and internal quotation marks omitted)  
23 ("Additional considerations may inform the doctrine's application  
24 in specific factual contexts."). See also Hamilton v. State Farm  
25 Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. 2001) (inconsistent  
26 position must be "accepted" by the first court, at least  
27 initially).

28 Judicial estoppel is appropriate in this case under the



1 foregoing principles. After years of litigation in this adversary  
2 proceeding over the proper beneficiaries of Leon's estate, the  
3 Successor Trustees and Ted's children argue that the dispute has  
4 been mooted by the state court orders. Yet those orders were  
5 obtained by misrepresenting to the state court that no such  
6 dispute existed -- that all the beneficiaries had waived any  
7 accounting and consented to the Successor Trustees' distributions  
8 and discharge and that Ted's children were "entitled" to those  
9 distributions, all of which ignores the Cassel Notice while  
10 failing to advise the state court that in fact the effectiveness  
11 of Ted's disclaimer and the propriety of distributions to Ted's  
12 children were still very much at issue in this adversary  
13 proceeding by virtue of the pending appeal to the Ninth Circuit.  
14 The defendants cannot have it both ways: they cannot misrepresent  
15 to the state court that everyone is in agreement and then argue to  
16 this court that the parties' disagreements have been conclusively  
17 resolved by the state court. That would (a) reward an  
18 inconsistent position that (b) was relied upon by the state court  
19 in issuing the State Discharge Order and (c) the advantage that  
20 this would give the Successor Trustees and Ted's children, and the  
21 detriment to Cassel, would be unfair because the state court  
22 orders are based on false and misleading statements to the state  
23 court. Moreover, judicial estoppel is appropriate in this case on  
24 both of the other traditional grounds, viz., to protect against  
25 the Successor Trustees and Ted's children playing fast and loose  
26 with the courts, and because of general considerations of the  
27 orderly administration of justice and regard for the dignity of  
28 judicial proceedings. Russell, 893 F.2d at 1037.

1 As stated at the start of this discussion, the Successor  
2 Trustees and Ted's children contend that Cassel should take his  
3 problems to the state court, but they also argue that the state  
4 court proceedings are final and the time to challenge the state  
5 court orders has long since passed. Whether or not the state  
6 court would apply judicial estoppel in these circumstances, this  
7 court will do so. The appropriate remedy is to preclude the  
8 defendants from relying in this court on the advantage they gained  
9 from their incorrect and inappropriate statements to the state  
10 court. The Ninth Circuit applied this remedy in Russell:

11 The state prevailed by telling the state court the  
12 opposite of what it told the federal court. The  
13 proposition that the state can be estopped from  
14 relying on the advantage it gained by doing so  
15 seems unremarkable.

16 Russell, 893 F.2d at 1038.<sup>8</sup>

17 As a consequence of their actions, the Successor Trustees  
18 will be judicially estopped in this court to raise the state court  
19 orders as a bar to any liability they may have for distributing to  
20 Ted's children the proceeds that belonged to Ted's creditors.

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21 <sup>8</sup> In Russell the state of Washington opposed a prisoner's  
22 federal habeas corpus petition by arguing that the prisoner had  
23 "adequate and available" remedies in state court, which the Ninth  
24 Circuit held was "tantamount to advising the federal district  
25 court that [the prisoner] would be given a hearing in state court  
26 on the merits of his claims." Russell, 893 F.2d at 1038 (emphasis  
27 added). The prisoner then sought relief in the state courts, but  
28 the state successfully argued to the state court of appeals that  
the prisoner was "procedurally barred at that level . . . ." Id.  
at 1035 (emphasis added). The Washington Supreme Court affirmed.  
The prisoner then filed a second habeas corpus petition in federal  
court which the state opposed on the basis that a procedural  
disposition is not reviewable on habeas corpus and that the  
federal court was bound by the state courts' determination as to  
the procedural issue. The Ninth Circuit held that judicial  
estoppel barred the state from making this argument. Id. at 1037-  
39.

1 Ted's children will be judicially estopped in this court to raise  
2 the state court orders as a bar to returning the distributions  
3 they received, or as a bar to any liability for not returning  
4 those distributions. The court expresses no view as to the extent  
5 of defendants' liability for those distributions, but only holds  
6 that they cannot use the State Disclaimer Order and the State  
7 Discharge Order as a shield to any such liability.

8 IV. Conclusion

9 The Successor Trustees told the state court that all  
10 beneficiaries had consented to the distribution of Ted's share of  
11 Leon's trust and to their discharge. In fact, they knew that  
12 Ted's creditors claimed to be the true beneficiaries and did not  
13 consent to the distribution or the discharge.

14 Ted's children told the state court that they were "entitled"  
15 to receive proceeds of Leon's estate as beneficiaries. In fact,  
16 they knew that this was very much in dispute.

17 The state court relied on these false and misleading  
18 statements in issuing the State Disclaimer Order and the State  
19 Discharge Order. The Successor Trustees and Ted's children are  
20 judicially estopped from using those orders to evade the Ninth  
21 Circuit's final determination that the proceeds of Leon's estate  
22 belonged to Ted's bankruptcy estate.

23 Because of the number of pending motions, the complex  
24 procedural history, and past disputes as to the form of orders,  
25 the court will hold a status conference on May 11, 2006, at 1:30  
26 p.m. to discuss the forms of orders disposing of the 2003 Motions  
27 and the 2005 Motions and the future proceedings in this case.  
28 Counsel may but are not required to serve and upload proposed

1 orders before that time.

2 \* END OF MEMORANDUM DECISION \*

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